IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

CMA.No. 256 of 1997()

AS.149/1993 of DISTRICT COURT, ALAPPUZHA
OS.998/1986 of PRINCIPAL MUNSIFF,ALAPPUZHA
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APPELLANTS - APPELLANTS - DEFENDANTS:
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1. CHELLAMMA, D/O. KARTHYAYANI, SUSEELA MANGALATHU, NORTH ARYAD MURI, ARYAD NORTH VILLAGE. (DIED)

2. CHELLAMMA BHANUMATHI AMMA, PONVILANGATTU VEEDU, PALLIPPURAM, CHERTHALA FROM DO. DO.

3. CHELLAMMA CHANDRAMATHI AMMA, RESIDING AT SUSEELAMANGALATH, DO. DO.

4. CHELLAMMA PADAMAVATHI AMMA, DO. DO.

5. P. SUSEELAN NAIR, WORKING IN MADRAS CENTRAL WAREHOUSE, VINAGAR MANZIL, DO. DO.

6. PARAMESWARAN PILLAI SASIDHARAN NAIR, RESIDING AT SUSEELAMANGALATHU OF DO. DO.

7. CHELLAMMA REMA DEVI, DO. DO.

8. CHELLAMMA CHITHRAKUMARI, DO. DO.

9. CHELLAMMA PRESANNAKUMARI, DO. DO.

10. PARAMESWARAN PILLAI MURALEEDHARAN NAIR, DO. DO.

FIRST APPELLANT DIED AND APPELLANTS 2 TO 10 AND RESPONDENTS 27 AND 28 ARE RECORDED AS LEGAL HEIRS OF DECEASED FIRST APPELLANT AS PER ORDER DATED 13.9.2007 IN C.M.P. NO.1102 OF 2001.

BY ADVOCATE SHRI R. AZAD BABU

RESPONDENTS - RESPONDENTS - APPELLANTS - PLAINTIFFS - DEFENDANTS:

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1. KUTTY AMMA AMMUKUTY AMMA, NEDUMUDIYIL , NOW RESIDING AT KILIYAPPALLY, VADAKKAN ARYAD MURI, ARYADU VADAKKU VILLAGE.

2. AMMUKUTTY AMMA BALAKRISHNA PILLAI, DO. DO.

3. JANARDHANA PANICKER BLACHANDRAN PILLAI, DO. DO. (DIED)

4. JANARDHANA PANICKER RAMAKRISHNA PILLAI, DO. DO.

5. JANARDHANA PANICKER RAJASEKHARAN PILLAI, DO. DO.

6. AMMUKUTTY AMMA SARASWATHY AMMA DO. DO.

7. KUTTY AMMA THANKAMMA, DO. DO. (DIED)

8. THANKAMMA SAVITHRI AMMA, DO. DO.

9. JANARDHANA PANICKER RAMACHANDRAN PILLAI, DO. DO.

10. JANARDHANA PANICKER RAVIKUMAR OF DO. DO.

11. JANARDHANA PANICKER CHANDRAMOHAN, DO. DO.

12. JANARDHANA PANICKER MOHANA CHANDRAN, DO. DO.

13. JANARDHANA PANICKER VIJAYASREE, DO. DO.

14. SAVITHRI AMMA PREETHY NEDUMUDIYIL, DO. DO.

15. SAVITRHI AMMA JYOTHI OF DO. DO.

16. RAMAKRISHNA PANICKER ANILKUMAR (MINOR) OF DO. DO. (represented BY GUARDIAN AND MOTHER 8TH RESPONDENT)

17. LEELAMMA W/O. DAMODARAN PILLAI, DEEPA VILASOM, THIRUVAMPADY MURI, ALAPUZHA VILLAGE.F

18. LEELAMMA SREEKALA, DO. DO.

19. G. VIJAYAN PILLAI S/O. GOPALA PILLAI, THOTUNKARAYIL, NORTH ARYAD MURI, DO. VILLAGE.

20. A. JAGATHAMMA, D/O. GOPALA PILLAI, DO. DO.

21. G. CHANDRASEKHARA PANICKER, S/O. DO. DO.

22. A. CHANRIKA, D/O. DO. DO.

23. MOHAMMED ISMAIL, S/O. YOOSUFF KUNJU,

HASHAM MANZIL, VANCHIYOOR BHAGOM, ALANKOTTU MURI, ATTINGAL VILLAGE, CHIRAYINKEEZHU TALUK. (DIED)

24. KAMALA BAI, D/O. LAKSHMI AMMA, KUTTIKKATTU VEETTIL, VADAKKAEN ARYAD MURI, ARYADU VADAKKU VILLAGE.

25. HABSA BEEVI, SHAMATHI MANZIL, CIVIL STATION WARD, ALAPPUZHA.

26. M.M. GAZALI OF DO. DO.

27. CHELLAMMA KAMALAVATHI AMMA, SUSEELA MANGALATHU NORTH ARYAD MURI, ARYAD NORTH VILLAGE.

28. PARAMESWARAN PILLAI, SREEKUMARAN NAIR, DO.DO.

ADDITIONAL RESPONDENTS
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29. SARASWATHY AMMA, NIKARTHIL VEEDU, NORTH ARYAD P.O., ALAPPUZHA.

30. SABITHA, DO. DO.

31. BABITHA, DO. DOF.

32. SANGEETHA, DO. DO.

ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED THIRD RESPONDENT VIDE ORDER DATED 9.7.2007 ON I.A. NO. 414 OF 2007.

RESPONDENTS 2, 4, 5, 6 ARE RECORDED AS THE LEGAL REPRESENTATIVES OF THE DECEASED FIRST RESPONDENT AND RESPONDENTS 8 TO 16 ARE RECORDED AS THE LEGAL REPRESENTATIVES OF THE DECEASED 7TH RESPONDENT AS PER ORDER DATED 13.9.2007 IN I.A. NO.416 OF 2007

RESPONDENTS 25 AND 26 ALREADY IN THE PARTY ARRAY ARE RECORDED AS THE LEGAL REPRESENTATIVES OF DECEASED 23RD RESPONDENT AS PER ORDER DATED 5.4.1999 ON CMP NO.1732 OF 1999.

BY ADVOCATE SHRI K.RAVU
BY ADVOCATE SHRI S.SREEKUMAR R25 AND 26
BY ADVOCATE SHRI P.C. CHACKO R27 AND 28

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 13/09/2007 ALONG WITH CMA NO. 280 OF 1997 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 256 OF 1997
AND
C.M.A. NO. 280 OF 1997

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Dated this the 13th day of September, 2007

J U D G M E N T

These two Civil Miscellaneous Appeals arise from a common order of remand passed by the lower appellate court by which it set aside the decree passed by the trial court and remanded the suit for a limited purpose.

2. Short facts necessary for the disposal of the appeals are as follows: Eighteen plaintiffs filed a suit for partition of three items of properties on the following averments. The suit properties along with other properties belonged to Padinjare Velickakathu Veettil which is also known as Paravackal Tarwad. There was a partition of the assets of the family in the year 1108 M.E. as evidenced by Exhibit A1. The suit properties which are described as 'C' schedule to that partition deed was allotted to the branch consisting of plaintiffs 1 and 7, defendants 1 and 2, late Parvathy Amma, Kutty Amma, Narayana Pillai Kesava Pillai and Damodaran Pillai, son of Kutty Amma. Kesava Pillai died 39 years ago. He was

unmarried and issueless. Damodaran Pillai died on 15.12.1973. Plaintiffs 17 and 18 are his widow and daughter. Plaintiffs 2 to 6 are the children of first plaintiff. Defendants 8 to 13 are the children of the 7th plaintiff. Plaintiffs 14 to 16 are the children of the 8th plaintiff. For the sake convenience first defendant was taking yield from the western 45 cents of land in item No.1 and item No.3. The yield from eastern 90 cents of item Nos.1 and 2 is being taken by the plaintiffs. Mother of plaintiffs 1 and 7 gifted her right over the suit properties to them. On 2.5.1955 first defendant executed a document without any authority illegally and fraudulently in favour of his wife. In the sale deed it was purported to transfer the right over the western 45 cents of land in item No.1 in favour of the wife of the first defendant, who is impleaded as the third defendant, for one rupee. The same was null and void and does not affect the rights of the plaintiffs over the said property and the same is liable to be set aside. Plaintiffs came to know about Exhibit A6 sale deed only on 1.11.1986. In Exhibit A1 it is stated that there are certain leases and mortgages and all those documents are fraudulent documents. The property was in the possession of

the Karanavan of the family for and on behalf of the members of the Tarwad. Third defendant executed one sale deed on 29.3.1983 in favour of the 20th defendant and another sale deed on 31.5.1984 in favour of the 21st defendant regarding certain portions of item No.3 and those documents are null and void and to be declared so. Item No.2 was a paddy field and the same was reclaimed by the husband of the first plaintiff. Hence the suit for a declaration to the effect that Exhibits A6 to A8 are null and void and not binding on the plaintiffs and for partition of $^{18}/_{20}$ shares in the three items of properties and also for a decree of permanent prohibitory injunction restraining the defendants from committing any waste.

3. First defendant filed a written statement with the following contentions: The suit was not maintainable. The entire property allotted to the branch consisting of plaintiffs and defendants 1 and 2 were not in the possession of the Tarwad. An extent of 1.58 acres of land inclusive of 32 cents in item No.3 was outstanding on a possessory mortgage executed in the year 1100 M.E. and the mortgagee was in possession of the same. In the partition deed there was a

provision to redeem that mortgage, but the allottees under 'C' schedule never redeemed that mortgage and hence the right to redeem the mortgage was extinguished. The members of the Tarwad have no title and that property was not available for partition. Extent of item No.1 stated in the plaint was not correct. It is having only an area of 82.60 cents and situated on the eastern side of 'C' schedule. The western 52.400 cents of land along with 16 cents of land comprised in Sy.No.29/3-j having a total extent of 68.400 cents is known as 'Kaduvettuprambu' and those properties were the absolute property of Narayana Pillai Ayyappan Pillai. Ayyappan Pillai gifted that property to his wife and children on 19.4.1090 M.E. and the donees were in possession of the same from that date onwards. That right was subsequently got assigned by the third defendant and he is in possession of the same. The third defendant purchased the Jenm right from the owners of that property under sale deed No.1303 of 1120 M.E. and he became the absolute owner of the same. In respect of western 52.400 cents of land in item No.1, the Tarwad has no right or possession and 68.400 cents of land absolutely belonged to the third defendant. The property comprised in Sy.No.29/3-j

alone belongs to the Tarwad. Properties were leased out by Chakkanattu family to Chakki, Cheera, Konnan and Krishnan. Subsequently a mortgage was also executed and the property having an actual area of 68.400 cents devolved upon the third defendant. Allottees under 'C' schedule got possession and right only in respect of eastern 82.60 cents of land in item No.1, item No.2 and two small buildings in item No.1. It was contended that first defendant constructed a building in item No.1 and it absolutely belonged to him. Second defendant also filed a written statement adopting the contentions raised by the first defendant in his written statement. Third defendant filed a separate written statement asserting independent right over the western 68.400 cents of land in item No.1. It was contended that she is the absolute owner of that property and that property is not available for partition. Subsequent to the amendment of the plaint, third defendant filed an additional written statement contending that Exhibits A7 and A8 are not liable to be declared as null and void. Those sale deeds were not in respect item No.3 but are in respect of different properties sold by her.

4. Subsequently defendants 1 and 2 died. Legal

representatives of the first defendant were impleaded as additional defendants 4 to 14. Additional defendants 10, 11, 13 and 14 filed a joint written statement adopting the contention raised by the first defendant in his written statement. Legal representatives of deceased second defendant are additional defendants 15 to 19. But they did not file any additional written statement or contested the matter.

5. Trial court found that 45 cents of land in item No.1 was not available for partition in view of Exhibits B1 to B11 documents. Trial court also found that only 90 cents of land in item No.1 and whole of item No.2 were available for partition. Trial court further found that the plaintiffs are entitled to get a decree of permanent prohibitory injunction restraining the defendants from demolishing any building or from committing waste in the properties available for partition. The prayer of the plaintiffs to declare Exhibits A6 to A8 as null and void was declined. Trial court passed a decree declaring that the plaintiffs are entitled to get $^{18}/_{20}$ shares in item No.2 and 90 cents in item No.1. Defendants were restrained by a permanent prohibitory injunction from

committing any waste in the suit property until the passing of the final decree. Parties were directed to apply for passing of the final decree. Aggrieved by the decree of the trial court that entire item No.3 and portion of item No.1 were not available for partition, plaintiffs filed A.S. No.165 of 1993. Aggrieved by the decree of injunction, defendants filed A.S. No.149 of 1996. Since both the appeals arose from the same judgment, the two appeals were heard together and disposed of by a common judgment.

6. The lower appellate court found that Exhibit A6 sale deed is liable to be set aside and set aside the same. Lower appellate court also found that Exhibits A7 and A8 were executed after 1976 and hence those documents are valid to the extent of the shares of the vendors. It was also found that since they are having a definite share, Exhibits A7 and A8 cannot be set aside in toto. Thereafter lower appellate court found that all the three items are available for partition. But it found that the contention of the defendants that share of the members born after the commencement of the Joint Hindu Family System (Abolition) Act, 1976 was not considered by the trial court and for the purpose of deciding the exact quantum

of shares due to each of the members, the matter was remanded. Challenging the order of remand, these two Civil Miscellaneous Appeals are filed. Since there were two appeals, defendants filed two appeals. Civil Miscellaneous Appeal No.256 is filed against the order of remand in A.S. No.149 of 1993 and C.M.A. No.280 of 1997 is filed against the order of remand in A.S. No.165 of 1993. Since these appeals arise from the same suit, these appeals are consolidated, heard together and disposed of by a common judgment.

7. These appeals were filed in the year 1997. No substantial questions of law were framed at the time of admission. At the time of hearing, the following substantial questions of law were framed and the appeals are heard on the questions of law so framed.

> (1) Whether the finding of the lower appellate court that since Exhibit A6 is liable to be set aside, the entire item No.1 is liable to be partitioned is legal land proper?
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> (2) Whether the finding of the lower appellate court that Exhibit A6 is liable to the set aside is correct?
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> (3) Whether the finding of the lower appellate court that item No.3 is liable to be partitioned is supported by

any pleadings or evidence?

(4) Whether the finding of the trial court that 45 cents in item No.1 and entire item No.3 were not available for partitioned is legal and proper?

8. Admittedly, properties originally belonged to Padinjare Velickakathu Veettil which was also know as Paravackal Tarwad. The Tarwad had lot of properties. Under Exhibit A1 partition deed, the common Tarwad divided into six branches. Plaint 'C' schedule was allotted to the branch consisting of plaintiffs 1 and 7 and defendants 1 and 2 and others. Three items of properties were allotted to the share of that branch. It is not disputed that plaintiffs and defendants 1 and 2 were members of the branch to which 'C' schedule was allotted. According the defendants the eastern 82.60 cents of property in item No.1 and item No.2 alone were available for partition. It was contended that 32 cents in item No.3 was not available for partition. Trial court though found that Exhibit A6 is not liable to be set aside in view of Exhibits B1 to B11, it was held that item No.3 was not available for partition. Trial court further relied on an admission made by the first plaintiff in the box as P.W.1 to the effect that item No.3 was

outstanding on mortgage with strangers and that mortgage was never redeemed. The trial court had also found that the Tarawad lost its right to redeem and for partition those items were excluded. In the appeal, the lower appellate court set aside Exhibit A6. It was found that Exhibits A7 and A8 are valid and binding to the extent of the share of its executant. The decree passed by the trial court excluding 45 cents in item No.1 and entire item No.3 was set aside and it was held that all the three items were available for partition.

9. A perusal of the judgment passed by the trial court shows that the trial court had not considered the relevancy and evidentiary value of Exhibits B1 to B11 separately. Plaintiffs were denied relief only on the ground of the alleged admission made by P.W.1 in the box. Trial court did not consider whether the contention of the defendants that 32 cents of land in item No.3 was actually outstanding on a mortgage long prior to the partition is true or not. The lower appellate court has also not considered that issue. It considered the validity of Exhibit A6 deed alone. It did not consider the relevancy or evidentiary value of Exhibits B1 to B11. According to defendants 1 and 2 a lease was executed in

the year 1098 M.E. in respect of 68.400 cents of land. That lease was followed by a possessory mortgage and the tenancy arrangement was never terminated. They have also got a case that the mortgage was never redeemed and the Tharwad lost the right to redeem that mortgage. According to the contesting defendants the mortgagee became the absolute owner and that right was assigned in favour of the third defendant, who became the absolute owner over that property. Lower appellate court did not even refer to Exhibits B1 to B11. The lower appellate court set aside Exhibit A6 and found that item No.1 was available for partition. Regarding the finding of the trial court in respect of item No.3 the finding of the lower appellate court was that there was no need to set aside that finding. It was held that the sale deeds are valid to the extent of the shares of the sellers. But a decree was passed allowing the plaintiffs to get share from the entire property. It did not consider whether item No.3 was outstanding on mortgage and whether the right to redeem that property was lost. But in the decretal portion the lower appellate court held that item No.3 was also available for partition. The findings of the lower appellate court and that of

the trial court regarding the properties available for partition are illegal and unsustainable. Those issues require reconsideration. So while sustaining the order of remand passed by the lower appellate court, the finding of the trial court regarding non-availability of the western 45 cents of land in item No.1 and entire item No.3 for partition is set aside. The finding of the lower appellate court that all the three items are available for partition is also set aside The trial court shall consider the entire matter afresh in accordance with law.

10. In the result, the C.M.As. are allowed. The finding of the lower appellate court that all the three items are available for partition is set aside. But the order of remand is sustained. The finding of the trial court that western 45 cents of land in item No.1 and entire item No.3 are not available for partition is also set aside. The trial court is directed to consider all issues raised for consideration and dispose of the suit afresh in accordance with law as expeditiously as possible, at any rate, within six months from the date of first appearance of the parties. It is made clear that it is open to both sides to amend the pleadings and adduce evidence, if so

advised.

11. Parties shall appear before the Additional Munsiff, Alappuzha on 5.11.2007.

Civil Miscellaneous Petition No.694 of 1998 and I.A. No.1843 of 2006 in C.M.A. No.256 of 1997 and C.M.P. Nos.6092 of 1997, 737 of 2002 and 4732 of 2002 in C.M.A. No.280 of 1997 shall stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 256 OF 1997
AND
C.M.A. NO. 280 OF 1997

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J U D G M E N T

13TH SEPTEMBER, 2007